Filed 1/15/09 P. v. Holbea CA3

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. IOAN HOLBEA, Defendant and Appellant.	C057475 (Super. Ct. No. CRF05395)

Defendant pled no contest to one count of lewd and lascivious conduct with his stepdaughter. (Pen. Code, § 288, subd. (a).) The original sentencing court found him statutorily ineligible for probation and sentenced him to the midterm of six years. On appeal, this court remanded because the trial court erred in finding defendant ineligible for probation. (*People v. Holbea* (June 13, 2007, C051370) [nonpub. opn.].) At resentencing, the court denied probation and again sentenced defendant to the midterm. Defendant appeals, contending the

trial court erred (1) in failing to obtain a supplemental probation report; (2) in finding defendant posed a danger and rejecting the sex offender evaluation on the basis that defendant was Romanian; and (3) in increasing the fines under Penal Code sections 1202.4, subdivision (b) and 1202.45 from $600 to $1,200.

The Attorney General concedes the court erred in failing to obtain a new probation report and in increasing the fines. The Attorney General argues, however, that the first error was harmless and the court's sentencing decision was not an abuse of discretion. We agree. We modify the judgment as to the fines and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Given defendant's no contest plea in this case, we summarize the background facts chiefly from the probation report.

Defendant was born in Romania in 1954. He first came to the United States in 1983, but soon returned to Romania. Over the next several years, he alternated his residence between the two countries. In 1998, he married his second wife in Romania; later that year he came to the United States for good.

Defendant lived with his wife and stepdaughter, A., in Sacramento. Beginning in about 1999, while defendant was out of work with an injury and at home alone with his 10-year-old stepdaughter, he began "playing" and "snuggling" with A. He touched and kissed her breast and genitals, and put his penis in her mouth. A. later reported to police that defendant and she

engaged in this sexual conduct approximately 20 times between 1999 and 2005, when the family moved from Sacramento to Yuba County. Thereafter, A. refused to engage in sex acts with defendant.

In May 2005, defendant told his then 16-year-old stepdaughter he was sorry he had "raped" her while she was sleeping. Although A. did not know to which incident defendant was referring, she recalled that on three occasions in the previous two months she had awakened with a strange medicinal taste in her mouth. She believed defendant had placed some type of pill in her mouth as she slept.

The next month, defendant told A. that he had made a videotape of her having sex with him and threatened to show it to her mother if A. did not continue to engage in sex acts with him. Defendant also told A. that her mother would not love either of them if she saw the tape. A. continued to refuse defendant.

A. then told her mother what had happened, and made a police report.

When he was questioned by police, defendant admitted he had engaged in oral sex with A. seven or eight times while they lived in Sacramento and that he had continued to pressure A. for sex after she refused. He claimed he was often drunk during these episodes and that A. had sometimes been the aggressor. Defendant admitted he made up the story about the videotape of the two of them engaged in sex acts.

Charged with three counts of sexual misconduct with his stepdaughter, defendant entered a negotiated plea of no contest to the lewd and lascivious conduct charge, in exchange for dismissal of the remaining charges. The prosecutor recited the factual basis for the plea as follows: "[B]etween September 1st, 1999, and March 26th, 2003, the defendant willfully and unlawfully committed lewd and lascivious acts with [A.], . . . a child under the age of 14, by placing his mouth on her vagina and defendant did so with the specific intent to arouse or gratify his sexual desires." Defendant agreed that "at the time of sentencing the Court can consider such facts to be true."

Clinical psychologist Don Stembridge, Ph.D., interviewed defendant and submitted a written report. Dr. Stembridge found no evidence of a formal personality disorder and that defendant was not a pedophile. Instead, defendant "appears to be a man who used very poor judgment while under the influence of alcohol and Vicodin and engaged in fondling and oral sex with his stepdaughter several years ago. Following this, he appears to have become fixated on attempting to continue some sort of sexual relationship with her as she became older."

Dr. Stembridge found defendant rated low on four different sex offender risk assessment instruments. He noted these instruments were normed on populations in the United States and Canada; there were no such tests for Romanians.[1] He also found

---

[1] Because defendant's native culture and language are Romanian, Dr. Stembridge used non-verbal tests when possible.

defendant had a good prognosis for treatment, could be treated in the community, and posed no threat of harm.

The victim's mother, defendant's wife, submitted a four-page victim impact statement in which she stated her concern that defendant would hurt them. He had written letters to friends and family blaming A. for his being in jail. Defendant had threatened her, saying he did not need a gun, but could use gas to burn her. The mother was very worried about her daughter, who did not trust anyone now. The mother was afraid defendant would molest or hurt another child.

The probation report found defendant statutorily ineligible for probation. In any event, the report concluded he was unsuitable for probation because of the comparative seriousness of his offense which occurred over several years; his taking advantage of his position of trust as a stepfather; and the victim's vulnerability as she was left alone in the home with defendant. In considering the criteria for probation under rule 4.414 of the California Rules of Court,[2] the probation report found defendant's history did not indicate he was likely to be a danger to others if not imprisoned. (Rule 4.414(b)(8).)

The trial court denied probation and sentenced defendant to the midterm of six years in prison. In addition to other fines

---

In noting the lack of risk assessments for Romanian populations, he indicated "these limitations should be kept in mind when reading the following interpretations."

[2] All further references to rules are to the California Rules of Court.

and fees, the court imposed fines of $600 under Penal Code sections 1202.4 and 1202.45.

Defendant appealed. This court, finding the trial court erred in believing defendant was statutorily ineligible for probation, affirmed the conviction but vacated the sentence and remanded for resentencing.

On remand, the trial court referred the matter to the probation department for a time credit report.

In sentencing defendant, the court considered the original probation report from October 2005, the October 2007 time credit report, Dr. Stembridge's report and the mother's victim impact statement. The court found Dr. Stembridge's favorable report made defendant eligible for probation, but found defendant was not an appropriate candidate for probation under rule 4.414. It agreed with the probation report's assessment of the criteria for probation, except it found, under rule 4.414(b)(8), that defendant did pose a danger to young girls if he had unfettered access to them. The court found the rule 4.414 criteria did not justify a grant of probation.

The defense argued for probation, relying heavily on Dr. Stembridge's favorable report. The court responded there was a large question mark with the doctor's report because all the tests used to determine risk were based on a population other than a Romanian who had been back and forth between Romania and the United States. The validity of some of the tests' findings was questionable at best.

The court denied probation and sentenced defendant to the midterm of six years in prison. It imposed a restitution fine and a suspended parole revocation fine of $1,200 each.

DISCUSSION

I.

Defendant contends the trial court erred in failing to obtain a supplemental probation report before resentencing defendant. The Attorney General concedes the error, but argues it was harmless in this case. We agree.

Both Penal Code section 1203.2, subdivision (b), and rule 4.411(c), require ordering an updated probation report for sentencing proceedings that "'occur a significant period of time after the original report was prepared.'" (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180 (*Dobbins*).) The *Dobbins* court added: "The Advisory Committee Comment to the rule suggests that a period of more than six months may constitute a significant period of time, even if the defendant remains incarcerated and under the watchful eyes of correctional authorities." (*Id*. at p. 181.)

Here the probation report was prepared in October 2005 and defendant was resentenced in October 2007. Although defendant remained incarcerated this entire period, the two years was substantially more than the six months the Advisory Committee Comment suggested as a significant period of time. (Advisory Com. com., West's Cal. Rules of Court (2008 ed.) foll. rule 4.411, p. 236.) The trial court erred in failing to obtain a supplemental probation report before resentencing.

Defendant contends there is a conflict in the case law as to the proper standard of review. He asserts that the denial of a supplemental probation report is akin to a structural error requiring reversal because in most cases the reviewing court is unable to determine if a current report would have disclosed information beneficial to defendant. He claims the denial of the right to a current probation report is itself a miscarriage of justice. He contends, however, that reversal in this case is required even under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836.

We adopt the standard of review set forth in this court's recent decision in *Dobbins, supra,* 127 Cal.App.4th 176. There, this court rejected a rule of automatic reversal because it found no federal constitutional right to a supplemental probation report. (*Id.* at p. 182.) Since the error implicated only California statutory law, review was governed by the harmless error standard of *People v. Watson, supra,* 46 Cal.2d 818, 836. (*Dobbins, supra,* at p. 182.) Thus, we reverse only if it is reasonably probable defendant would have obtained a more favorable result if not for the error. (*People v. Watson, supra,* at p. 836.)

Defendant contends there is a reasonable probability of a different result with a supplemental probation report. First, he contends *Dobbins* is distinguishable. In *Dobbins*, the defendant was being resentenced after violating probation by committing a new offense, so probation was unlikely. (*Dobbins, supra,* 127 Cal.App.4th at p. 183.) Here, by contrast, probation

was a possibility; in our prior opinion, we stated a grant of probation would not be an abuse of discretion. Further, defendant contends a new probation report would have shed further light on his efforts at rehabilitation; both his Bible study and his participation in drug and alcohol counseling.

On this record we find no such reasonable probability of a different result. The trial court parted company with both the probation report and Dr. Stembridge on the issue of defendant's dangerousness. As discussed below, the court's finding is supported by the main factors that militate against a grant of probation -- the circumstances of his crime, especially its relative seriousness. His offense was not a single drunken act, but rather a series of lewd acts over a several year period. He agreed to the factual basis of lewd acts between September 1999 and March 2003. The victim reported 20 such acts and defendant admitted to 7 or 8. Given this egregious conduct, which the court found made defendant a danger, when coupled with defendant's violation of trust and the victim's vulnerability, it is not reasonably probable that a supplemental probation report would have made a difference in the decision whether to grant probation. The error in failing to obtain a supplemental probation report was harmless.

II.

Defendant contends this case must be remanded for resentencing because the trial court's finding that he poses a danger to others is not supported by the record. He contends the trial court rejected Dr. Stembridge's report solely on the

basis that defendant is Romanian. He argues such a classification based on national origin violates due process and equal protection.

The trial court disagreed with the conclusion in the probation report that defendant did not pose a danger if not incarcerated. Based on the reports, the trial court found "the Defendant, in fact, does pose some danger to young girls that he had unfettered access to." Defendant contends the evidence does not support this finding.

Where, as here, defendant is convicted of a lewd or lascivious act on a child, a trial court cannot grant probation until it receives a report on defendant's mental condition. (Pen. Code, § 288.1.) Regardless of the contents of the report, however, the court retains discretion to grant or deny probation. (See *People v. Smith* (1988) 204 Cal.App.3d 1496, 1499.) Dr. Stembridge's report concluded defendant posed a low risk of reoffending and no danger to the victim. This report, however, also provided a basis for the trial court to disagree with these conclusions.

First, Dr. Stembridge blamed defendant's actions on "poor judgment while under the influence of alcohol and Vicodin." (ACT 10) This finding is less persuasive in light of defendant's continuous acts of molestation over several years. As the original sentencing court noted, "most everybody after being intoxicated and doing something stupid sobers up and realizes that he or she has done something stupid and makes efforts to avoid it in the future."

Further, once A. began to refuse defendant, he did not simply stop but resorted to pressure and manipulation. Defendant told A. he had a videotape of them having sex and threatened to show it to her mother unless she had sex with him. He increased his manipulation by telling A. her mother would not love either of them after seeing the tape. Dr. Stembridge found defendant became "fixated" on continuing a sexual relationship with A. According to A.'s account, rather than accept rejection, defendant drugged A. and then apologized for "rape." The trial court could easily conclude that defendant's actions went far beyond mere poor judgment.

Dr. Stembridge's report indicated defendant failed to take full responsibility for his conduct. He continued to blame his victim for his actions. Testing revealed defendant had problems with sexual entitlement. Defendant "believes a person should have sex whenever it is needed, women should oblige men's sexual needs, everyone is entitled to sex, men need sex more than women do, and he believes he has a higher sex drive than most people." According to Dr. Stembridge, defendant had no understanding of his risk factors; his coping strategies were "poorly developed and not well thought out."

In explaining his rejection of the section 288.1 report, the trial court noted the risk assessment tools were normed on populations in the United States and Canada, while defendant was a Romanian who traveled back and forth between the United States and Romania. As such, the court found the results questionable. Defendant contends the trial court engaged in unconstitutional

national origin classification. We read the court's comments as simply reflecting the limitations of the tests as pointed out by Dr. Stembridge in the report. As outlined above, there was ample evidence from which the court could disagree with Dr. Stembridge's conclusions.

In effect, defendant is challenging the trial court's determination that he was not a suitable candidate for probation. "The trial court enjoys broad discretion in determining whether a defendant is suitable for probation." (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1256.) "To establish abuse, the defendant must show that, under the circumstances, the denial of probation was arbitrary or capricious. [Citations.] A decision denying probation will be reversed only on a showing of abuse of discretion. [Citation.]" (*Id*. at p. 1257.)

The trial court did not abuse its discretion in denying defendant probation. The egregious nature of his offense, particularly its prolonged nature, together with the other factors cited by the court fully supported the court's decision.

III.

At the original sentencing hearing, the trial court imposed a restitution fine of $600 under Penal Code section 1202.4, subdivision (b) and a parole revocation fine of $600 under Penal Code section 1202.45. At resentencing, the court imposed these fines in the amount of $1,200 each. Defendant contends the trial court erred in increasing the fines and the Attorney General properly concedes the error. On remand, neither the

length of the sentence nor the amount of fines may be increased. (*People v. Hanson* (2000) 23 Cal.4th 355, 363.)

DISPOSITION

The judgment is modified by reducing to $600 both the restitution fine (Pen. Code, § 1202.4, subd. (b)) and the parole revocation fine (Pen. Code, § 1202.45). As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and deliver it to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.